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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 560

ANDREW J. EASTER, PETITIONER

v.

THOMAS S. GATES, JR., SECRETARY OF THE NAVY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the District Court granting the Government's motion for summary judgment (Pet. App. 6A) is not reported. The opinion of the Court of Appeals (Pet. App. 9A) is reported at 247 F. 2d 78.

JURISDICTION

The judgment of the Court of Appeals was entered on June 20, 1957 (Pet. App. 9A). The petitioner's timely motion for rehearing was denied on July 24, 1957 (Pet. App. 10A). The petition for certiorari was filed on October 18, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the grounds for petitioner's dismissal from public employment may be re-tried by the District Court.

2. Whether the procedures prescribed by the Lloyd-LaFollette Act have been followed in petitioner's dismissal.

3. Whether a delay of over two years and three months in seeking reinstatement in public employment constitutes laches.

STATUTE INVOLVED

The Lloyd-LaFollette Act, 37 Stat. 555, as amended, 62 Stat. 354, 5 U. S. C. 652, provides in pertinent part as follows:

> No person in the classified civil service of the United States shall be removed or suspended without pay therefrom except for such cause as will promote the efficiency of such service and for reasons given in writing. Any person whose removal or suspension without pay is sought shall (1) have notice of the same and of any charges preferred against him; (2) be furnished with a copy of such charges; (3) be allowed a reasonable time for filing a written answer to such charges, with affidavits; and (4) be furnished at the earliest practicable date with a written decision on such answer. No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. * * *

STATEMENT

Petitioner, a non-veteran civil service employee, instituted this suit on March 19, 1954, to compel the Secretary of the Navy to restore him to his position in the Bureau of Ships, Department of the Navy, from which he had been dismissed on May 14, 1951 (R. 2, 5–6). The District Court granted the Government's motion for summary judgment on the ground that petitioner's removal was lawful, and that, in any event, his claim was barred by laches (R. 36). This judgment was affirmed *per curiam* by the Court of Appeals for the District of Columbia Circuit (R. 46).

The facts, as they appear from the pleadings and the exhibits attached to the motion for summary judgment, may be summarized as follows:

On March 26, 1951, petitioner was notified by letter that the Bureau of Ships was considering termination of his employment for cause (R. 13). This letter detailed five charges: unsatisfactory performance, insubordination, disrespectful attitude toward supervision, unreliable attendance, and a lack of interest in his work which was adversely affecting the morale of other employees (R. 13). The factual basis for these charges was elaborated in detail (R. 13–15). Petitioner was informed that he had five days in which to answer, and that he might request a hearing if he so desired (R. 15). Petitioner answered at length and concluded by requesting a hearing (R. 15–22).

Hearings were held April 5, 9, 10, 17, and 18, 1951 (R. 22). The Government presented its witnesses, petitioner's counsel cross-examined them, and petitioner introduced his own witnesses and exhibits.

By letter of May 12, 1951, petitioner was notified by the Chief of the Bureau of Ships that, after a consideration of all the facts presented at the hearing, petitioner would be removed for cause on May 14, 1951 (R. 22). He was also informed of a right of appeal to the Under Secretary of the Navy (R. 22). Petitioner pursued this administrative remedy and was advised by the Under Secretary of the Navy, by letter of November 28, 1951, as follows (R. 23):

> The entire record in your case has been carefully reviewed and considered. Each of the charges is supported by competent evidence, both documentary and oral, and it is clearly established that the penalty of removal is appropriate. Your appeal, therefore, is denied.

On March 25, 1952, petitioner filed a complaint in the District Court for the District of Columbia (Civ. No. 1307–52), substantially the same as in the instant case (R. 33). The defendant in the 1952 action, the then Secretary of the Navy, Dan A. Kimball, resigned his position on January 19, 1953. Robert B. Anderson was appointed his successor. One year, one month, and 20 days passed and petitioner took no action with respect to this fact. In this posture of the case, the Government moved, late in February 1954, to dismiss for failure to substitute the party defendant in accordance with Rule 25 (d), F. R. C. P. The motion was granted on March 9, 1954. On March 19, 1954, two years, three months and 20 days after his appeal to the Under Secretary of the Navy had been denied, petitioner instituted the present suit (R. 2–3).

ARGUMENT

1. Petitioner's contention (Pet. 11–17) that the District Court should re-try the factual grounds for his dismissal from the Navy Department contravenes the firmly established principle that "a court of law has no jurisdiction to inquire into the guilt or innocence of the employee as to the charges upon which he was removed." *Levine* v. *Farley,* 107 F. 2d 186, 191 (C. A. D. C.), certiorari denied, 308 U. S. 622. Judicial review of the discretion of executive officers in discharging Government employees is limited to a consideration of whether there has been compliance with the statutory procedural requirements. The decisions are uniform that "if the prescribed procedure, if any, is followed and no constitutional or statutory right is denied, action of executive officers in discharging employees is not subject to revision in the courts." *Levy* v. *Woods,* 171 F. 2d 145, 146 (C. A. D. C.). To the same effect are *Eberlein* v. *United States,* 257 U. S. 82; *Keim* v. *United States,* 177 U. S. 290; *Keyton* v. *Anderson,* 229 F. 2d 519 (C. A. D. C.); *Williams* v. *Cravens,* 210 F. 2d 874 (C. A. D. C.), certiorari denied, 348 U. S. 819; *Carter* v. *Forrestal,* 175 F. 2d 364 (C. A. D. C.), certiorari denied, 338 U. S. 832.

2. There was more than strict compliance with the procedural requirements of the applicable statute in petitioner's discharge; he was given the benefit of extensive consideration and procedures which the Lloyd-LaFollette Act, 5 U. S. C. 652, *supra,* p. 2,

did not impose on the agency. The five procedural requirements of the Act were all fulfilled:

First, the employee must have notice that his removal is sought and of the charges preferred against him. Second, he must be furnished with a copy of these charges. Petitioner received a letter from the Chief of the Bureau of Ships dated March 26, 1951, advising him that his removal was being considered and listing five charges[1] (R. 13–15).

The third procedural requirement of the statute is that the employee be given a reasonable opportunity to answer the charges, with affidavits. Instead of being allowed to file only affidavits, petitioner was accorded a full-dress hearing at which he was represented by counsel who cross-examined the Government's witnesses and presented witnesses who testified on petitioner's behalf (R. 13–15). A hearing is not required by the statute, which specifically provides, *supra*, p. 2:

> No examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer or employee directing the removal or suspension without pay. * * *

The statute's fourth procedural requirement is that the employee be furnished at the earliest practicable date with a written decision on his answer. On April 3, 1951, the day after petitioner filed his administrative answer, he was notified in writing that

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[1] Unsatisfactory performance, insubordination, disrespectful attitude toward supervision, unreliable attendance, and a lack of interest in his work which was adversely affecting the morale of other employees (R. 13–15).

his reply was "not considered satisfactory" and that the requested hearing would be held (Exhibit 5, attached to defendant's motion for summary judgment).

The final requirement of the statute is that the reasons for the removal be given in writing. At the conclusion of the administrative process, the Under Secretary of the Navy wrote petitioner on November 28, 1951, that "Each of the charges is supported by competent evidence, both documentary and oral" (R. 23).[2]

Petitioner's sole complaint with the procedure he was accorded appears to be that, because he was not notified prior to his administrative appeal of the reasons for the hearing officer's decision, he could not present an effective appeal (Pet. 10, 17–22). This, petitioner contends, is a violation of the statute. But the statute requires neither an appeal nor an initial hearing. All that is required is that at the conclusion of the administrative process reasons be given if the decision is adverse to the employee. That was done here (R. 23). Petitioner cannot complain of a statutory violation of his rights with reference to an administrative appeal when the statute makes no provision for such an appeal.

3. Moreover, petitioner's suit is barred, in any event, by laches. The instant suit was not commenced until over two years and three months after the denial of his appeal by the Under Secretary of the

[2] In *Green* v. *Baughman*, 243 F. 2d 610, 612 (C. A. D. C.), certiorari denied October 14, 1957, No. 192, this Term, it was held that the charges need not be repeated in the letter of dismissal so long as direct reference is made to them therein.

Navy.[3] That such unexcused delay in challenging dismissal from public employment constitutes laches is now well-settled. *United States ex rel. Arant* v. *Lane,* 249 U. S. 367 (delay of almost 2 years); *Nicholas* v. *United States,* 257 U. S. 71 (3 years); *Norris* v. *United States,* 257 U. S. 77 (11 months); *Haas* v. *Overholser,* 223 F. 2d 314 (C. A. D. C.) (2 years); *Elchibegoff* v. *Dulles,* 123 F. Supp. 831 (D. D. C.), affirmed, 222 F. 2d. 53 (C. A. D. C.), certiorari denied, 350 U. S. 874 (6 years); *Sawyer* v. *Stevens,* 221 F. 2d 822 (C. A. D. C.), certiorari denied, 348 U. S. 959; *Love* v. *Stevens,* 207 F. 2d 32 (C. A. D. C.); *Grasse* v. *Snyder,* 192 F 2d 35 (C. A. D. C.) (16 months); *United States ex rel. Cromwell* v. *Doyle,* 99 F. 2d 448 (C. A. D. C.), certiorari denied, 306 U. S. 640 (2½ years); *Caswell* v. *Morgenthau,* 98 F. 2d 296 (C. A. D. C.), certiorari denied, 305 U. S. 596 (18 months).

The only mitigating factor which petitioner can offer for his delay is the prosecution of an ineffective law suit which culminated in dismissal (for failure to substitute the party defendant) nearly two years after the complaint was filed.[4] This very excuse has been

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[3] Petitioner was discharged on May 14, 1951; his appeal to the Under Secretary of the Navy was denied on November 28, 1951; this suit was instituted March 19, 1954 (*supra*, p. 4).

[4] Petitioner filed his first suit on March 25, 1952. That suit was dismissed on the Government's motion on March 9, 1954 (*supra*, p. 4).

considered and rejected. See *Baxter* v. *Pace,* 193 F. 2d 20, 22 (C. A. D. C.), in which the court said:

> [Appellant] did not press his claims effectively against the Secretary of War (Army) until nearly four years after his dismissal. Such a delay in this type of case constitutes laches, and bars the action.

See also *Drown* v. *Higley,* 244 F. 2d 774 (C. A. D. C.) (delay of 27 months); *O'Connor* v. *Summerfield,* 239 F. 2d 69 (C. A. D. C.) (2 years, 4 months); cf. *Grasse* v. *Snyder,* 192 F. 2d 35 (C. A. D. C.), where other ineffective attempts to find redress did not mitigate the effect of the delay in filing suit.[5]

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[5] The Government was not guilty, as petitioner charges, of any excessive delay in defending the first suit. The complaint in the first suit was filed on March 25, 1952 (R. 33). On July 7, 1952, the defendant filed a motion to dismiss or in the alternative for summary judgment (R. 33 and Record in Civ. No. 1307–52, District Court for the District of Columbia). The Government therefore delayed for six weeks beyond the time allowed by Rule 12 (a), F. R. C. P., for filing an answer or motion. Following the denial of the Government's motion with leave granted petitioner to file an amended complaint, petitioner filed an amended complaint on November 12, 1952 (Record in Civ. No. 1307–52). Answer was filed on April 7, 1953, approximately two and one-half months after Rule 12 (a), F. R. C. P., calls for the filing of a responsive pleading (R. 34). Thus, the Government can be charged with at most four months of the delay (six weeks delay in responding to the original complaint; two and one-half months delay in responding to the amended complaint) which extended for over two years and three months before an effective suit was commenced.

More to the point is petitioner's own lack of diligence in his prosecution of his claim, which is reflected in the fact that he took no action to change defendants for one year, one month, and twenty days after the original defendant had resigned his position, *supra*, p. 4.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

PAUL A. SWEENEY,
HERSHEL SHANKS,
Attorneys.

NOVEMBER 1957.

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IN THE

Supreme Court of the United States

October Term, 1957.

No. 560

ANDREW J. EASTER,
Petitioner,

v.

THOMAS S. GATES, JR., Secretary of the Navy,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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PETITION TO RECONSIDER DENIAL OF CERTIORARI

Petitioner respectfully and urgently requests Your Honors to review the proceedings here, and with respect suggests that the following points may have been overlooked:

1. The Order of the District Court (Pet. App. 4A) denied the Defendant's (Respondent's) Motion for Summary Judgment, and Judge Youngdahl said: "*I think under all the circumstances in a case of this nature the Court should not grant summary judgment, but should let it go to trial.*" (Petitioner's Petition p. 22, also p. 20 last sentence: "In paragraph 9 of the respondent's answer filed April 7, 1953 and the answer to the complaint in this suit, filed September 27, 1954 (Pet. brief app. p. 10A, para. 9) respondent admits, and in fact stated, '*that petitioner was not furnished with findings of fact,*'" then follows the rea-

son of Judge Youngdahl on pp. 21-22). The Order of Judge Letts (6A) on the same motion granted the Defendant's Motion for Summary Judgment and, in part, states: *"there exists no genuine issue of material fact, that plaintiff's* (Petitioner's) *removal was legal and valid, and that plaintiff's claim is barred by laches, and that the defendant is entitled to judgment as a matter of law."*

Petitioner respectfully submits for the careful consideration of Your Honors that genuine issues of facts clearly exists here—as the specific charges made against Your Petitioner (10A-12A) by H. N. Wallin, (then) Chief of Bureau.

The said charges being fully refuted as disclosed by reference to Petitioner's petition pp. 11 (par. a.)-16, being part of the transcript identified in the original record as Exhibit 13, transmitted to this Honorable Court.

AUTHORITIES RE SUMMARY JUDGMENT

"This rule providing summary judgment procedure affects substantial rights of litigants and is not merely directory." Hoffman v. Babbitt Bros. Trading Co., C.A. Ariz., 203 F. 2d 636. Petitioner's substantive rights are affected here.

"On defendant's motion for summary judgment, allegations of complaint must be taken as true, and unless it appears with absolute certainty that plaintiff is not entitled to relief upon any theory the request for summary judgment should be denied." Smart v. U. S., D. C. Okl. 111 F. Supp. 907.

"The office of the motion for judgment on the pleadings or for summary judgment is for practical purposes the same, and often both are applicable, but if it is necessary to consider matters outside the pleadings, motion for judgment on the pleadings is to be treated as a motion for summary judgment, and neither can be granted

if there is any genuine issue as to any material fact." Munn v. Robinson, D. C. Ark. 92 F. Supp. 60, affirmed 188 F. 2d 1. Genuine disputes of material facts exist between the Parties here as referred to above.

"Rule providing for summary judgment was not designed to permit trial of real and genuinely contested issues of fact by affidavits." Suckow Borax Mines v. Borax Consol. C.A. Cal. 185 F. 2d 196, certiorari denied 71 S. Ct. 506, 340 U.S. 943, 95 L.Ed. 680, rehearing denied 71 S. Ct. 620, 341 U.S. 912, 95 L.Ed. 1349.

Petitioner's index to petition p. II notes the Administrative Procedure Act, which Act provides, among other procedures, "Sec. 5. In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved (1) any matter subject to a subsequent trial of the law and the facts de novo in any court;"

Sec. 7. (c) * * * the proponent of a rule or order shall have the burden of proof. * * *.

Sec. 8. (3) supporting reasons * * * as well as the reasons or basis therefor, upon all the material issues of fact, * * *.

Sec. 10. (a) Any person suffering legal wrong because of any agency action, * * * shall be entitled to judicial review thereof."

Petitioners index to petition p. III cites Sec. 10. pg. 8 (e) Scope of Review.—of above act, which also provides, among other powers, that "the reviewing Court—shall * * * (B) hold unlawful and set aside agency action, findings and conclusions * * * (5) unsupported by substantial evidence * * * (6) unwarranted by the facts to the extent that the facts are subject to trial de novo * * *. In making the foregoing determinations the Court shall review the whole record * * * and due account shall be taken of the rule of prejudicial error."

And Sect. 12, of above act, "Nothing in the act shall be held to diminish the constitutional rights of any person * * *."

Petitioner's index to petition bottom of p. III notes the LaFollette-Lloyd Act as amended, which statute cites:

"Sec. 6 (b) (1) Any person removed * * * (a) * * * removal * * * unjustified or unwarranted, * * *."

Petitioner respectfully avers that had the District Court (Judge Letts) considered the evidence in the transcript or the portions of the evidence referred to above on pp. 11 (par. a)-16, a finding of genuine issues of facts would have been shown, which issues are outside of the pleadings, and the Petitioner is rightfully entitled to a trial of those issues, and, of course, Amendment VII, U.S. Constitution, provides the right of trial by jury.

LACHES—NOT A BAR TO PETITIONER'S SUIT

Petitioner's petition (3A) gives reference to Administrative Procedure, beginning on March 26, 1951 through November 28, 1951. (1A) shows: Petitioner's Complaint filed on March 25, 1952, against Dan A. Kimbel. Various proceedings until on or about February 19, 1954, when Counsel for both parties here agreed that the said complaint be dismissed because of inadvertent failure to substitute Robert B. Anderson as party defendant due to circumstances contributed to respondents' negligence, in filing their answer on April 7, 1953, (1A), affidavits (Pet. brief app. p. 33A, 34A), and verified by (Brief for the respondent in opposition, pg. 9[5]) and that a second complaint would be filed, the latter being filed on March 9, 1954 (pp. 2, 8). On July 8, 1954, Charles S. Thomas was substituted as party defendant (5A). On April 26, 1957, Thomas S. Gates, Jr. was substituted as party defendant (8A). The failure to substitute was treated in an equitable manner. Snyder v. Buck, 340 U.S.

15, specifically granted the party whose suit had abated the right to start over where there had been a failure to substitute. Also see citations on p. 26. And, further, no loss or inconvenience was incurred by the Respondent.

In conclusion, the Petitioner prays this Honorable Court to remand this case to the U.S. Court of Appeals, District of Columbia Circuit, with instructions to direct the U.S. District Court, District of Columbia to recind and vacate its Order of June 26, 1956 (6A) and to set for trial the issues of material facts disputed by the parties here, or for the reasons herein stated and the further reasons which will be disclosed by careful reading of the entire record of the proceedings here, your Petitioner respectfully prays this Honorable Court to grant to him the Writ of Certiorari.

Respectfully submitted,

ANDREW J. EASTER,
In Proper Person,
2801 Adams Mill Road, N.W.,
Washington 9, D. C., Apt. 108,
Petitioner.

Dated: January 2, 1958

CERTIFICATION

It is hereby certified by the undersigned that this petition is presented in good faith and not for delay and that the petition is restricted to grounds which are confined to intervening circumstances of substantial or controlling effect, available to petitioner, although not previously presented.

And that 3 copies of this petition were served on the Solicitor General, Counsel for the Respondent, Department of Justice, Washington 25, D. C. on the 2nd day of January 1958.

ANDREW J. EASTER,
Petitioner.